

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**JESUS DeSANTIAGO, JR.**

Claimant

V.

**CITY OF WICHITA**

Self-Insured Respondent

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Docket No. 1,071,302

**ORDER**

Self-insured respondent, through Edward Heath, of Wichita, requests review of Administrative Law Judge Ali Marchant's June 18, 2015 preliminary hearing Order for medical treatment. Joseph Seiwert, of Wichita, appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the November 25, 2014, March 3, 2015 and June 11, 2015 preliminary hearing transcripts and attached exhibits, in addition to all pleadings contained in the administrative file.

**ISSUES**

Claimant alleges he slipped, nearly fell and injured his low back and legs on August 6, 2014. He asserts he never had prior leg symptoms.

Respondent contends claimant did not sustain a compensable work-related accidental injury because initial medical records documented no such history, claimant had prior low back and leg symptoms and the court-ordered physician opined the accident was not the prevailing factor in claimant's medical condition and need for treatment.

The disputed issue is whether claimant sustained personal injury by accident arising out of and in the course of employment, including whether his accident was the prevailing factor in causing his medical condition and need for treatment.

**FINDINGS OF FACT**

Claimant was a court officer. He performed desk work for respondent for nearly two decades before assuming new duties in July 2014, which included transporting prisoners and carrying restraints. Claimant testified he had problems walking and "jumping" or climbing about one foot in and out of vans used to move prisoners.<sup>1</sup>

Three preliminary hearings occurred. Claimant only testified at the initial preliminary hearing held on November 25, 2014.

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<sup>1</sup> P.H. Trans. (Nov. 25, 2014) at 7.

Claimant testified he was injured on August 5, 2014, when entering a van while carrying cuffs or belly chains or leg shackles. He stepped off a board and slipped, but held onto the steering wheel and pulled himself back up. The extent of his injuries included his lower back, his legs and right foot. Most of his pain was on his right side. He testified he was too embarrassed to mention anything to his supervisor about what occurred on the date of accident. Claimant alleged in his application for hearing, and the parties seem to agree, that his accident date is August 6, 2014.

Claimant admitted having prior low back pain, but denied bilateral leg pain prior to his slip and near fall. He characterized his back pain after his accident as being a “pulling, stretching, more of a concentrated pain, you know, that would run up and down the right side, both legs, which I, you know, had not ever experienced before in the past . . . .”<sup>2</sup>

Claimant reported to work on Thursday, August 7, 2014. He had problems getting out of his car. He may have worked about one hour. Claimant testified he had problems continuing to do his job duties, such as getting in and out of the van. He testified that on August 7, he notified his supervisor about his slipping incident and his right foot was “numbing” and he could not walk.<sup>3</sup> Claimant reported back problems to some firemen, who had an ambulance take him to Wesley Medical Center (WMC).

Claimant testified he probably gave Sedgwick County EMS (EMS) personnel a complete history of what was bothering him and when it started. The EMS records state claimant had back pain, but he denied trauma. The EMS records further indicated:

This [patient] began experiencing lower right sided back pain about a week ago. Over the weekend the lower back continued to spasms [sic] with occasional pains shooting down his legs. Ibuprofen helped with the pain until today. Upon arrival at work he had problems getting out of his car, then was unable to get up out of his chair. EMS was then called . . . . The [patient] denied . . . any recent trauma.<sup>4</sup>

WMC records state claimant complained of back pain for one week radiating into his legs without recent trauma and he denied injury of any kind.

Records of Thanh N. Truong, D.O., claimant’s primary care physician, show claimant reported low back pain starting in November 2011. Claimant saw Dr. Truong in January 2013 for bilateral back pain.

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<sup>2</sup> *Id.* at 24.

<sup>3</sup> *Id.* at 13.

<sup>4</sup> *Id.*, Cl. Ex. 3 at 12.

More relevant to the current dispute, claimant saw Dr. Truong on Monday, August 4, 2014, and reported several issues, including fever, chills, muscle aches, a sore throat, a discolored toenail, frequent urination that began three days earlier and right-sided low back pain that began two days earlier. Claimant specifically mentioned he changed his job two weeks earlier from sitting in a chair all day to standing and walking all day. Dr. Truong took claimant off work until August 6, and noted claimant would rest his back. The record did not indicate if claimant was being taken off work specifically for his back or his other health issues.

Claimant called Dr. Truong's office on August 8, 2014:

Told scheduler . . . he was working and started having back pain, went to ER from work. Call transferred to billing to obtain WC info. Patient told me his job description had changed & he was now doing physical activity and started having back pain on 8/3/14. He was on [Dr. Truong's] schedule 8/4/14 for body aches/fever but when he was seen he also complained of back pain. He has not filed an accident report with work so there is no claim on file. He was off work Mon-Tue & returned on Wed. On Thursday 8/7/14 while at work, he was unable to get out of the vehicle due to back pain. After some time he was able to walk to the City Bldg but once he sat down he was not able to get back up. He was taken by ambulance to the ER. . . . I went over job related injuries with him & how he needed to call his employer to report work related injury & check if the City required employees to see company doctors.<sup>5</sup>

When asked about such information, claimant testified he did not recall his back pain started on August 3, 2014.

Claimant filled out an incident report on August 18, 2014. He reported slipping and falling from a van, but catching the steering wheel, while carrying belly chains and leg shackles on or about August 7, 2014.

Respondent sent claimant to Via Christi for treatment. On August 20, 2014, claimant reported having stepped up into a van while carrying body chains and he was able to grab the steering wheel, but he slipped and developed leg pain, numbness and tingling the next day. A September 15, 2014 report noted claimant had mostly right-sided low back pain radiating to his right thigh.

A September 19, 2014 report from Myron J. Zeller, M.D., indicated claimant reported injuring his low back when slipping off a cargo van while carrying shackles and other chains. A document from Via Christi of that same date indicated claimant was hurt on August 6, 2014. Dr. Zeller noted an MRI showed significant spinal stenosis, a central disc extrusion at L2-3 and disc bulging at L3-4. Referral to a neurosurgeon was made.

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<sup>5</sup> *Id.*, Cl. Ex. 4 at 84.

After the first preliminary hearing, Judge Thomas Klein ordered an independent medical evaluation with David Hufford, M.D. Judge Klein concluded claimant reported a work accident, but “the evidence on prevailing factor issues and potential pre-existing conditions are not as clear.”<sup>6</sup> The court issued no ruling regarding whether claimant sustained personal injury by accident arising out of and in the course of employment.

Dr. Hufford examined claimant on January 13, 2015. Dr. Hufford noted claimant had a sedentary job, but was switched to carrying belly chains and transporting prisoners. According to Dr. Hufford, claimant’s right leg gave out without explanation on August 6, 2014. Claimant denied to Dr. Hufford any significant prior lumbar spine injury or chronic preexisting low back pain.

Dr. Hufford stated claimant was pleasant, but not a reliable historian because the medical records showed prior low back pain and corresponding, periodic treatment with Lortab. The doctor’s impression was low back pain with exacerbation during work activity. Dr. Hufford stated claimant’s incident on August 6, 2014:

... was precipitated when he states that his right leg simply “gave out” for no other apparent reason and without any apparent factor that can be attributed directly to his work activities. Therefore, the prevailing factor for his current low back pain is pre-existing degenerative disc disease and I do not believe that any disc herniation at L2-L3 occurred during the specific work incident.<sup>7</sup>

Regardless of causation, Dr. Hufford recommended corticosteroid injections, and if they did not provide relief, surgical consideration.

The second preliminary hearing was held on March 3, 2015. Judge Marchant concluded in a March 10, 2015 Order that claimant did not prove his accident was the prevailing factor in his condition and need for medical treatment. The parties then sought clarification from Dr. Hufford regarding his opinions if claimant had slipped and twisted while carrying belly chains. In an April 28, 2015 letter, Dr. Hufford stated his response to the hypothetical scenario was conjecture because he already gave a prevailing opinion based on what he viewed as an accurate history. Dr. Hufford further stated:

In the hypothetical situation that Mr. DeSantiago slipped and twisted in axial torsion during the conduct of his work activities it is possible that a disc herniation could occur in this manner and that the prevailing factor for his injury would therefore be the acute tissue trauma associated with this work injury.<sup>8</sup>

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<sup>6</sup> P.H. Order at 1 (Nov. 26, 2014).

<sup>7</sup> Hufford Report (Jan. 13, 2015) at 2.

<sup>8</sup> Hufford Report (Apr. 28, 2015) at 1.

The third preliminary hearing was held on June 11, 2015. The judge concluded:

- Claimant consistently reported how his accident occurred in his testimony, the incident report and the history he gave Dr. Zeller. Only EMS and WMC records failed to mention a specific incident at work, but claimant testified he only later recognized the significance of his slip and near fall.
- Claimant developed new symptoms of leg pain after his accidental injury.
- Dr. Hufford overstepped his role as a medical expert and offered opinions regarding how claimant's accident occurred and whether it arose out of his employment, which are legal determinations for the judge to make.
- Claimant's accident was the prevailing factor in his lumbar disc herniation and need for medical treatment. The court maintained "its prior order that Claimant met with personal injury by accident arising out of and in the course and scope of his employment."<sup>9</sup>

#### **PRINCIPLES OF LAW & ANALYSIS**

Claimant has the burden of proving personal injury by accident arising out of and in the course of employment based on a "more probably true than not true" standard.<sup>10</sup>

Dr. Hufford's belief that claimant's leg spontaneously gave out without any known cause is inaccurate. However, Dr. Hufford is correct about claimant's history being inaccurate. The following occurred in 2014:

- On August 4, claimant told Dr. Truong he had back pain related to switching from sedentary work to a more physical job. Claimant was taken off work, perhaps for an illness, but he was going to rest his back. Claimant returned to work on August 6.
- On August 7, claimant told EMS personnel his back pain started a week earlier without trauma and he had spasms and occasional pain shooting down his legs the weekend of August 2-3. Claimant told WMC personnel he had low back pain radiating into his legs for a week without trauma.
- When claimant called Dr. Truong's office on August 8, he stated his low back pain started on Sunday, August 3, and, on August 7, he had trouble getting out of his car and getting out of a chair later at work.

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<sup>9</sup> P.H. Order at 3 (June 18, 2015).

<sup>10</sup> K.S.A. 2014 Supp. 44-501b(b) & K.S.A. 44-508(h).

These contemporaneous records do not mention an August 6 slip and near fall while claimant was getting into a work van and carrying belly chains or any other restraints. Rather, such records indicate claimant had onset of back pain and leg symptoms the weekend of August 2-3. This Board Member was unable to find testimony from claimant that he belatedly appreciated the importance of his slip, twist and near fall only after providing histories to EMS and WMC personnel in which he denied injury or trauma. The histories to EMS personnel and WMC do not support a conclusion claimant was hurt at work as alleged.

### **CONCLUSION**

This is a close and difficult decision. Based on the evidence, claimant did not prove personal injury by accident arising out of and in the course of employment on or about August 6, 2014, including whether his accident was the prevailing factor in his medical condition and need for treatment.

**WHEREFORE**, the undersigned Board Member reverses the June 18, 2015 preliminary hearing Order.<sup>11</sup>

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2015.

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HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

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Honorable Ali Marchant

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<sup>11</sup> By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.